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REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Discrimination against HIV-infected people or people with AIDS

Preliminary report prepared by Mr. Luis Varela Quiros, Special Rapporteur

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Introduction

A. Background to this report

1. By its resolution 1990/65, entitled "Discrimination against HIV-infected people or people with AIDS", the Commission on Human Rights endorsed the appointment of the author to undertake a study of the problems and causes of discrimination agains. HIV-infected people and people with AIDS. This study had been proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 1989/17. Having examined the concise note which this author had prepared on HIV/AIDS-related discrimination, the Sub-Commission decided that the subject-matter should be studied in depth.

2. This preliminary report cannot do more than outline some of the main issues which the study will have to address. Its aim is to provide a basis for discussion of HIV/AIDS-related discrimination at the forty-second session of the Sub-Commission. This discussion will assist the author in finalizing the framework for the study, and especially in defining substantive issues which ought to be dealt with and methods for addressing them.

3. Some particularly pertinent questions relating to this study need to be brought to the attention of the Sub-Commission for its consideration. Most importantly, the author's terms of reference specify as the main object of the study discrimination against people who are HIV-infected or people with AIDS. This seemingly terminological issue has profound consequences for the orientation of the study, which derive from the natural history of HIV infection. One of the features of HIV infection is that persons who are infected may remain asymptomatic for a long time, maybe a decade or more. The progression from HIV infection to AIDS is slow and varies greatly. Data about the percentage of HIV-infected persons that will develop AIDS can indicate only statistical probabilities about the proportion of HIV-infected persons that will develop AIDS, and the time frame for all these is the past decade when HIV/AIDS has been known. This has lead some scientists to speak about HIV-infection and HIV-related diseases, rather than referring to AIDS.

4. The existing pattern of HIV/AIDS-related discrimination includes the status of infectiousness (HIV infection) and impaired health (AIDS) as different grounds for discrimination. The former is closely linked to fear of contagion, which is more often a consequence of fear rather than a possibility of contracting HIV infection, because of its limited communicability. The latter represents a form of discrimination on the grounds of health, which the Sub-Commission addressed in its resolution 1989/17 and which is partially being dealt with by the Special Rapporteur on human rights and disability. The issue of the scope and limitations of the present study therefore needs to be analysed carefully.

5. There are similarities between HIV/AIDS-specific discrimination and discrimination against people with impaired health in general. Suffice it to recall that measures to prohibit discrimination against disabled persons were not adopted until 1975, and there are still no express provisions covering the right of the ill to protection from discrimination, where the rights of persons with infectious diseases require particular attention. When addressing the problem of discrimination against persons who are HIV-infected but asymptomatic, we are dealing with the population category whose rights

were in history systematically denied. Many current problems can thus be traced to the heritage of denial of human rights to persons with communicable diseases.

B. Summarized overview of the HIV/AIDS pandemic

6. The human immunodeficiency virus (HIV) is transmitted primarily through sexual intercourse. As of 1990, more than half of all global HIV infections have been spread by heterosexual intercourse. Two major types of HIV are known: HIV-1 and HIV-2. HIV-2 is found primarily in West Africa. Its modes of transmission appear identical with HIV-1, but it is not known whether it is as pathogenic as HIV-1.

7. HIV transmission via infected blood or blood products was a relatively limited but important mode of transmission until the mid-1980s in industrialized countries. As of the late 1980s this problem is being addressed in most developing countries, but has not yet been solved in many.

8. The HIV pandemic is dynamic and has changed markedly during its first decade. In most industrialized countries, the incidence of new infections is decreasing while in many developing countries HIV incidence is increasing at an alarming rate. It is unlikely that the global prevalence of HIV infections will stabilize or level off for at least several decades.

9. As of mid-1990, over 250,000 cases of AIDS have been reported to the World Health Organization (WHO). But, because of under-recognition, under-reporting, and delays in reporting, WHO estimates that close to 700,000 AIDS cases may have occurred. Also as of mid-1990, WHO estimates that from 6 to 8 million HIV infections have occurred world-wide.

10. During the 1990s, AIDS will have a very selective and severe impact on adult and child mortality rates in many parts of the world. More than 3 million AIDS cases will occur in persons infected prior to 1990 and another 1 to 2 million AIDS cases will develop as a result of unprevented HIV infections acquired in the 1990s.

11. WHO/GPA has described several epidemiological patterns of HIV infections and AIDS cases (HIV/AIDS) based on two factors: the time when HIV was introduced or began to spread extensively in a specified population, and the dominant mode or modes of HIV transmission.

1. Pattern I: industrialized Western countries

12. In the industrialized Western countries (North America, Western Europe, Australia and New Zealand) HIV infections began to spread extensively at the beginning of the past decade. Through the 1980s, men who had sex with other men and self-injecting drug users were predominantly affected. This epidemiologic pattern has been designated as pattern I by WHO.

13. Within pattern I countries, marked differences exist in the proportion of AIDS cases among homosexual men and self-injecting drug users. On the west coast of the United States of America, about 90 per cent of AIDS cases have been diagnosed in homosexual men, while on the east coast up to 40 per cent of cases have geen identified in self-injecting drug users. Similarly in

Western Europe, the vast majority of AIDS cases in the north - especially the Scandinavian countries - has occurred in homosexual men. In the south - particularly Spain and Italy - self-injecting drug users constitute more than half of reported AIDS cases. Within pattern I countries, transmission of HIV among homosexual men has decreased markedly since the mid-1980s. Heterosexual transmission has been increasing slowly during the latter half of the 1980s, especially in urban populations with high rates of other sexually-transmitted diseases (STDs) and drug use.

14. Estimates of HIV seroprevalence in many pattern I countries have been revised downward in recent years as more epidemiologic and serologic data become available. As of mid-1990, an estimate 1.5 million HIV infections have occurred in pattern I countries, with about one million infections in the United States of America alone.

15. Perinatal transmission has not been a major problem in pattern I countries during the 1980s, but is increasing as the number of HIV-infected women grows. It has been estimated that up to 20,000 infants may have been born to HIV-infected women since the start of the epidemic in the USA alone.

16. In many large cities of pattern I countries, AIDS has become the leading cause of death in young adults aged 20 to 40. HIV-related deaths will become one of the leading, if not the leading cause of death in this age group. Homosexual men and self-injecting drug users will continue through the 1990s to be the most severely affected.

2. Pattern I/II: the Caribbean and Latin America

17. Extensive spread of HIV infection probably began in the early 1980s, at first affecting predominantly homosexual or bisexual men and self-injecting drug users residing in large cities, as in pattern I countries. In many countries during the latter half of the 1980s, heterosexual transmission of HIV increased to become a major, if not the major, mode of spread of HIV infection. As a result, WHO reclassified the Caribbean, Central and South American countries as epidemiologic pattern I/II.

18. In some Central and South American countries bisexual men have accounted for up to 25 per cent of all reported AIDS cases. Many of these men are married and have stable female sex partners. As a result, increasing numbers of women are becoming infected. Also, HIV prevalence among female prostitutes in Central American countries has increased markedly.

19. As of mid-1990, close to 250,000 AIDS cases have been reported from pattern I/II countries: more than 10,000 from Brazil, 4,000 from Mexico, 2,300 from Haiti and 1,200 from the Dominican Republic. Some of the world's highest AIDS case rates are found in the Caribbean (Bermuda, the Bahamas and Haiti). The actual number of AIDS cases that have occurred may be 50 per cent to 100 per cent higher than reported. The total number of HIV-infected persons is thought to be between 500,000 and 1 million.

3. Pattern II: sub-Saharan Africa

20. Epidemiologic and medical data indicate that extensive spread of HIV started in Central and Eastern Africa in the late 1970s. Heterosexual

transmission of HIV continues to be the dominant mode of spread of HIV infection; hence this region has been classified as pattern II. HIV transmission via infected blood (about ten per cent of all HIV infections) continues to constitute an important public health problem. The contribution of such factors as circumcision (male or female), ritual scarification and unsterile needles and syringes is not believed to account for more than one per cent or two per cent of HIV infections. High rates of sexually-transmitted diseases are believed to be important factors which facilitate the rapid spread of HIV in sexually-active persons.

21. Owing to heterosexual transmission of HIV, the numbers of male and female AIDS cases and HIV infections are about equal. Because many women of child-bearing age are infected, HIV transmission from infected mother to foetus or infant (perinatal transmission) is a widespread and increasing problem in sub-Saharan Africa.

22. Most African countries did not begin routine reporting of AIDS to WHO until 1987. Reporting has improved markedly since 1989 and as of mid-1990 about 65,000 AIDS cases have been reported. But WHO estimates that close to 400,000 adult AIDS cases could have occurred in Africa - or more than half the estimated global number. Estimation of the total number of HIV-infected people by mid-1990 is three to four million; up to 30 per cent of 15 to 49 year olds in large urban areas may be infected with HIV.

23. During the 1990s, the impact of AIDS will be greatest in large urban areas, especially in Central and Eastern Africa. In urban centres, AIDS deaths in young children and in those aged 15 to 49 will reduce expected population growth by over 30 per cent and the adult mortality rate will more than triple. Expected infant and child deaths due to AIDS may increase child mortality rates by as much as 50 per cent. It is estimated that 200,000 HIV-infected children have already been born in Africa.

4. Pattern III areas

24. Areas in which HIV was only introduced or began to spread extensively in the mid-1980s or later have been classified by WHO as pattern III. This includes countries in North Africa, the Middle East, Eastern Europe, Asia and the Pacific (excluding Australia and New Zealand, which belong to pattern I).

25. As of 1990, pattern III countries have less than five per cent of estimated global HIV infections yet they contain about 70 per cent of the world's population. They reported some 1,000 AIDS cases, less than 0.5 per cent of the global total. During the last few years, however, the situation has been changing markedly in a few countries.

26. In some Eastern European countries (USSR, Romania) extensive HIV transmission has occurred in infants and young children as a result of inappropriate medical practices, namely the re-use of injection equipment and blood transfusions. As those societies open themselves, we expect to have more reliable data in the near future regarding the spread of the AIDS virus on such countries.

27. Only a few pattern III countries have documented extensive spread of HIV infections within the last few years, but in virtually all large cities sexually-transmitted diseases are prevalent and the extent of intravenous drug use is not well known.

5. Natural history of HIV/AIDS

28. Studies to date indicate that about 50 per cent of persons infected with HIV will develop AIDS within ten years of infection. No data are available beyond ten years, but the majority of HIV-infected persons are expected to develop AIDS eventually. No major differences have been found in progression rates for young and middle-aged adults by geographical area or race. Different progression rates have been noted only among infants and older persons (more than 50 years of age), whose progression to AIDS is more rapid. Whether the natural history of HIV infection differs to any significant degree between men and women is not known.

29. Virtually all persons diagnosed as having AIDS die within a few years, but survival after diagnosis of AIDS has been increasing in industrialized countries from an average of one to two years to three to four years at present. Survival time in developing countries remains short, one to two years at most. Survival appears to be directly related to the use of antiviral and prophylactic drugs and the general quality of medical care.

I. THE FOCUS OF THE STUDY: HIV/AIDS-RELATED DISCRIMINATION

30. Non-discrimination is a core principle of human rights because discrimination is one of the reasons for and justification of human rights violations, namely it is refusal to recognize that all human beings have equal rights and the consequent denial of equal rights to all.

A. The phenomenon of HIV/AIDS-related discrimination

31. The pattern of discrimination we have witnessed in the context of HIV/AIDS has repeated some of the known grounds for discrimination (particularly race, nationality and ethnic origin), reinforced others (most often, discrimination on the basis of impaired health and/or disability, and sexual orientation) and introduced a new form of discrimination on the basis of the status of infectiousness. Discrimination has been particularly widespread against people who are HIV-infected but without symptoms of impaired health. As HIV infection can only be detected through blood tests, and people who are infected may remain asymptomatic for a decade or longer, efforts to identify HIV-infected persons have often resulted in violation of their privacy and integrity, and led to the subsequent denial or violations of their rights if they have been found HIV-infected.

32. Selectiveness in measures introduced to identify persons who are HIV-infected has often been discriminatory itself: the notion of "high-risk group" has been used loosely to include homosexuals, prostitutes, prisoners, drug users, incoming aliens, foreign students, and compulsory screening of such "groups" has often caused their further stigmatization.

33. The underlying reasoning for this discrimination appears to have been the assumption that because people who are HIV-infected might infect others, they will do so. Thereby the result of blood tests, which does not determine more than the presence of antibodies to HIV in one's blood, has been used as grounds for denying or limiting rights of HIV-infected people, and this has been based on the assumption that HIV-infected people will invariably behave irresponsibly. As responsible individual behaviour has been accepted to constitute the key to AIDS prevention and control, international and many national public health authorities have made the promotion of responsible behaviour by all the key to preventing further spread of HIV infection. Information and education should be stressed as a deterrent against the spread of AIDS and maybe because no medical cure is foreseen in the near future, as the most effective social tool against it.

34. The underlying reasoning is the following: HIV infection is spread in three ways only (sexual intercourse, through blood, and from an infected mother to her infant) and these are subject to human control. Further transmission of HIV infection can be stopped by changed behaviour, because everybody can take the same precautions. As the vast majority of HIV infections is acquired through sexual intercourse, it is the behaviour of two persons that transmits infection. Thereby public health rationale urges avoidance of discrimination against people who are HIV-infected. Rather, it advocates their counselling and support to promote and sustain their responsible behaviour. It has been proven that discrimination undermines the public health strategy for AIDS prevention and control.

35. People who are HIV-infected and those with AIDS have been denied marriage, employment, housing, social services, education, entry into a

country. For purposes of this study, it is necessary to distinguish between different phenomena which have been termed discriminatory from the viewpoint of human rights. The following simple typology can be proposed:

(a) HIV/AIDS-related restrictions which constitute a denial of a human right, such as the right to marry and to found a family;

(b) Those which represent a restriction in the exercise of a recognized human right, such as freedom of movement, where returning nationals are refused entry into their own country because they are HIV-infected or ill with AIDS;

(c) Those which do not constitute a denial of a human right nor an obstacle to the exercise of a recognized right, but appear discriminatory, such as denial of entry into a country to an HIV-infected alien, where the principle of non-discrimination may apply.

36. The scope of the principle of non-discrimination, as it may or should apply to various forms of HIV/AIDS-related discrimination, therefore needs to be carefully analysed for each type of policy or practice which appears discriminatory.

B. Application of non-discrimination in the context of HIV/AIDS

37. The general prohibition of discrimination in international human rights law entails a whole range of obligations for the public authorities, thus including public health authorities, which reach far beyond a legal prohibition of discrimination. The Human Rights Committee declared that equal and effective protection against discrimination is an autonomous right. This view emanates from article 26 of the Covenant, which states that all individuals are equal before the law and entitled to equal protection of the law against any discrimination. A broad interpretation of non-discrimination has also extended it to all human rights, be they political or social, economic or cultural. It thus encompasses all areas regulated by public authorities, thereby including public health. This has been reinforced by the explicit inclusion of the avoidance of discrimination in the Global AIDS Strategy, which is dealt with in the next section.

38. Non-discrimination includes corrective and compensatory policies in favour of those that are vulnerable to discrimination and those which have been subjected to it. The Human Rights Committee found that there was an obligation on the part of the State to undertake "affirmative action designed to ensure the positive enjoyment of rights". 1/ Such affirmative action may consist of laws, policies, measures or actions needed to remedy discrimination, in fact, that is, to redress de facto inequalities. When aimed at redressing inequalities, to enable people to enjoy and exercise their rights on an equal footing, differential treatment is legitimate, hence it does not constitute discrimination. The Human Rights Committee said that "the principle of equality sometimes required States to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination", and therefore "action needed to correct discrimination in fact is a case of legitimate differentiation". 2/

39. The sheer number of international policy documents adopted against HIV/AIDS-related discrimination is probably the best indication of its

existence and of the threat it represents to the principle of equal rights for all. The number relating to human rights aspects of HIV/AIDS has grown fast: in only three years, that is as of the adoption of the Global AIDS Strategy in May 1987, there have been dozens. All these reiterate the existing prohibition of discrimination, state that it should apply in the context of HIV/AIDS, and urge the adoption of specific actions against HIV/AIDS-related discrimination at the international, regional, national and local level.

40. The necessity of avoiding discrimination in responding to HIV/AIDS was first affirmed by the World Health Assembly, then by the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. A range of organizations within the United Nations, including the International Labour Organisation, United Nations High Commissioner for Refugees and United Nations Population Fund, adopted explicit non-discrimination policies in the areas of their work. International human rights bodies - both governmental and non-governmental - have started including HIV/AIDS-related discrimination on their agenda. The Committee on Economic, Social and Cultural Rights has included HIV/AIDS-related human rights issues in its consideration of States' reports. The Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) has adopted a general recommendation relating to avoidance of gender discrimination in responding to AIDS. The Council of Europe has been the most active regional body to outlaw and seek to prevent HIV/AIDS-related discrimination. In 1989, the WHO Regional Offices started a series of meetings aimed at elaboration of regional approaches to the avoidance of discrimination relating to HIV/AIDS. A compilation of the relevant documents has been put together by the WHO's Global Programme on AIDS. 3/ This momentum alone stresses or emphasises the urgency and severity of the problem of HIV/AIDS-related discrimination.

II. THE MAIN CONCEPTUAL PROBLEM: RESTRICTING HUMAN RIGHTS ON PUBLIC HEALTH GROUNDS

41. HIV/AIDS-related restrictions placed upon some population categories and individuals who are HIV-infected, or suspected of infection, are often justified by the claim that they are necessary to protect public health. The issue has thus been defined as the need to disregard the "rights of the few" to protect the "rights of the many". Such reasoning is a false dilemma in human rights: the protection of the uninfected majority depends upon and is inextricably bound with the protection of the rights and dignity of the infected persons. As we know only too well, once the rights of some are denied, human rights as a whole are jeopardized.

42. Public health constitutes recognized grounds for restricting human rights, and a range of human rights and fundamental freedoms may be restricted. The International Bill of Human Rights includes general principles relating to restricting human rights. Article 29 of the Universal Declaration contains the fundamental provision, and it is further elaborated in Articles 4 and 8.1 (a) of the International Covenant on Economic, Social and Cultural Rights and Articles 4, 12 (3), 13, 18 (3), 21 and 22 (2) of the International Covenant on Civil and Political Rights. The grounds include national security, public order, safety and morals, general welfare, protection of the rights and freedoms of others, and also public health. Detailed conditions for restricting human rights have been elaborated through the examination of States' reports, individual communications procedures, United Nations studies, the work of special rapporteurs and the human rights doctrine.

43. It is therefore important to determine whether AIDS prevention and control, based on the public health rationale, necessitates or justifies imposing limitations on human rights. The internationally accepted principles of AIDS prevention and control, as elaborated by WHO, should serve as guidance. The Global AIDS Strategy has established basic principles for AIDS prevention and control, based upon the public health rationale, knowledge of HIV virology and epidemiology, and derived from broad experience in controlling infectious diseases world-wide. The Global AIDS Strategy has provided the framework within which regions and countries have developed their own AIDS prevention and control programmes; it does not endorse restricting human rights, but rather the contrary.

44. The World Health Assembly in its resolution WHA41.24, entitled "Avoidance of discrimination in relation to HIV-infected people and people with AIDS", urges States to observe human rights in their AIDS policies, and to avoid discriminatory action in the provision of services, employment and travel. The Global AIDS Strategy has thereby achieved a genuine precedent in the history of responding to disease by the explicit inclusion of human rights. The World Health Assembly has affirmed that human rights standards fully apply in the context of HIV/AIDS, stressing the following three principles:

(a) The responsibility of the State to safeguard the health of everyone;

(b) The vital importance of the respect for the human rights and dignity of HIV-infected people and people with AIDS to the success of AIDS prevention and control;

(c) The avoidance of discriminatory action against and stigmatization of HIV-infected people and people with AIDS.

45. These principles have been further elaborated in a series of guidelines and consensus statements elaborated within or with the support of WHO's Global Programme on AIDS. Moreover, the Global Commission on AIDS emphasized that no "blanket exemption from observance of human rights obligations" may be accepted in combatting AIDs. 4/ The International Consultation on AIDS and Human Rights emphasized the need "for protection of the human rights of those specially at risk of exposure to HIV so that they will be empowered to protect themselves. By so doing, they are enabled to fulfill their responsibility to protect others." It concluded that exemptions from observance of human rights, whereby discriminatory measures are regularly justified, could not be justified simply by claiming that they were required for public health reasons. 5/

46. Because cure for HIV infection is not available and infection is lifelong, it is essential to prevent its further spread. The keystone of HIV prevention is information and education, as HIV transmission can be prevented through informed and responsible behaviour. HIV transmission involves the behaviour of two persons; a change in behaviour of either the HIV-infected or the uninfected person will be sufficient to prevent HIV transmission. Each person, HIV-infected or uninfected, thus bears responsibility not to put himself or other persons at risk of infection with HIV. In addition to information and education, support for changes in individual behaviour - to encourage and sustain responsible behaviour of all, not only of HIV-infected persons - is a key component of AIDS prevention.

47. The Global AIDS Strategy stresses that to prevent HIV infection effectively, persons whose behaviour place them at increased risk of exposure to HIV must be informed, educated and provided with health and social support. Persons suspected or known to be HIV-infected should remain integrated within society to the maximum possible extent and be helped to assume responsibility for preventing HIV transmission to others. Exclusion of these persons would be unjustified in public health terms and would undermine the public health programme to prevent further spread of HIV infection.

48. In some countries, penal codes have been emended to impose sanctions on persons exposing others to HIV, intentionally or recklessly, under the general criminal law, laws relating to sexually-transmitted disease, or under special AIDS legislation. Such criminalization has an impact on human rights because its aim is deterrence targeting HIV-infected persons. Most importantly, such legislation discourages HIV testing, because the knowledge of one's HIV infection constitutes proof of possibility of its transmission to others. Prosecution for such offences, in countries where is has taken place, has proven extremely complicated because of the need to prove that the accused knew that he or she was HIV-infected, that his or her actual conduct in fact infected that other person and that the other person did not give consent to the risk of being infected.

49. The rights of some persons may be legitimately restricted, but not on the grounds of HIV infection alone. Cases where the right to privacy has been restricted included those where a HIV-infected person refused to inform his or her partner of the risk of HIV infection through unprotected intercourse. HIV-infected persons who continued to place others at risk by their irresponsible behaviour can, by obvious reason, be placed in detention.

III. HIV/AIDS CONTROL MEASURES AFFECTING THE EXERCISE OF HUMAN RIGHTS

A. Identification of HIV-infected persons

50. Many AIDS control measures that are currently applied entail interference with the individual right to privacy. Most of these target particular population categories for which there is a mental link with HIV/AIDS, commonly referred to as "high-risk groups". These often include homosexuals, prostitutes and self-injecting drug users, but sometimes reach much further when, for example, such a mental link with HIV/AIDS is attributed to race or ethnic origin.

51. Public health surveillance, whereby public health authorities seek to determine the extent of HIV infection in the country and the methods and dynamics of its spread, is a traditional response to epidemics of communicable diseases. It consists of routine collection, analysis and distribution of data relevant for the prevention and control of diseases. In the case of HIV/AIDS the thrust of surveillance is testing, because HIV infection can only be identified through blood tests. This can be done by anonymous or unlinked testing, where the personal identity of the person whose blood sample is tested for HIV cannot be determined, or through case finding, where the purpose is to identify persons who are HIV-infected. The latter raises a range of human rights issues.

1. HIV testing

52. Before restriction can be imposed on persons who are HIV-infected, these persons ought to be identified through blood tests. Testing may be done voluntarily, by informed consent of the persons concerned, or by making the HIV test obligatory for determined categories (such as immigrants, employees, foreign students, prisoners) or individuals (persons suspected of being infected). The results of the HIV tests may be reported to the health, immigration or prison authorities, or to employers, or registers of HIV-infected persons may be established to include all personal data. Moreover, reporting of test results may lead to the tracing and informing, and also testing of sexual partners of HIV-infected persons.

53. Compulsory testing denies individual dignity, autonomy and privacy and has become a major human rights problem in the context of HIV/AIDS.

54. Categories that have often been subjected to compulsory testing for HIV include blood donors, prostitutes (female and less often male), self-injecting drug users, homosexual or bisexual men, international travellers and migrants (immigrants, migrant workers and asylum seekers), seamen, foreign students, hospital patients, applicants for marriage licences, pregnant women, prisoners and military personnel, among others.

55. WHO has rejected compulsory HIV testing as a means for reducing the spread of HIV infection, except in the case of voluntary donors of blood, semen or other cells, tissues or organs. In the view of WHO, efforts to compel people to undergo HIV testing are counter-productive, thus strengthening the human rights arguments against it. A negative HIV test gives no guarantee that the person tested is not a carrier of the virus: he or she might acquire the infection the following day, or might indeed be

infected, but not yet have seroconverted. Instead, public health experts recommend voluntary HIV testing to identify infected persons - who might not otherwise change their behaviour because they do not know they present a risk - so that they can be intensively counselled not to engage in behaviour that might be dangerous to others.

56. It is pertinent to note that the Committee of Ministers of the Council of Europe, taking into account the European Convention on Human Rights, has recommended that "there should be no compulsory screening (for HIV infection) of the general population nor of particular population groups" and that "health authorities should instead invest resources in the setting up of sites ... for voluntary testing ...".

2. Collection and disclosure of personal data

57. HIV/AIDS control measures which include collection and disclosure of personal information about individuals suspected of HIV/AIDS or tested for HIV infection (including, for example, test results, and answers to questions about sexual activities, partners, travel and drug use) involve an interference with the right to privacy. Most often, human rights problems are created by the disclosure of the results of HIV tests without the consent of the person concerned. Such disclosure may be justified only when it is necessary for the protection of the rights of others. Breach of confidentiality is warranted in exceptional circumstances, where despite counselling, an HIV-infected person continues to have unprotected sexual intercourse with his or her partner(s). Also, such disclosure seems justifife in the HIV-infected person is a health worker and is consistently negligent in observing routine hygiene precautions, or fails to follow medical advice about his or her work.

58. Collecton and disclosure of personal data is a consequence of making AIDS or HIV infection notifiable without safeguards of confidentiality. Notification of cases of AIDS and HIV infection is a necessary public health measure, but it can be done without any identifying particulars from which the patients could be traced, or, if personal identity is included, notification can be subjected to the rules of medical confidentiality. In some countries medical practitioners are required to report to a public authority all cases of HIV/AIDS which they encounter among their patients, with identifying particulars, and without protection of confidentiality. Disclosure of HIV infection may often lead to stigmatization and discrimination; it is therefore particularly important in the case of HIV/AIDS. There is increasing evidence that lack of confidentiality deters persons who might be HIV-infected from being tested.

B. Limitation of the rights of HIV-infected persons: examples

59. The human rights of people who are HIV-infected and those with AIDS have been denied, jeopardized or violated in many areas, such as education, employment, housing, access to social services, international movements, among others. In this preliminary report, only two examples will be mentioned - deprivation of liberty of HIV-infected persons, and restrictions placed upon their freedom of movement.

1. Personal liberty

60. HIV/AIDS-control measures that involve deprivation of liberty have been erroneously referred to as "quarantine", which cannot apply to HIV/AIDS because it is lifelong while quarantine is by definition of limited duration. What has emerged as a method of preventing further spread of HIV infection are various forms of confinement or isolation of HIV-infected persons in a hospital or hospice, or their placement in detention centres or prison.

61. WHO has expressed its view that detention is not warranted to prevent the spread of HIV infection: "There is no public health rationale to justify isolation [or] quarantine, ... based solely on the fact that a person is suspected or known to be HIV-infected." The primacy of protecting personal liberty has therefore been strengthened by the authoritative view that there is no public health rationale for its restrictions.

62. Deprivation of liberty on the grounds of HIV/AIDS appears incompatible with freedom from arbitrary arrest and detention. In interpreting this freedom, the Human Rights Committee has stated that the prohibition of arbitrary arrest or detention applies to all deprivations of liberty, such as "mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.". It added that any deprivation of liberty "must be based on grounds and procedures established by law, information on the reasons must be given, and court control of the detention must be available as well as compensation in the case of a breach". 6/

63. The possibility of lawful detention for the purpose of preventing the spread of infectious diseases is envisaged in the European Convention on Human Rights [Article 5, para. 1 (e)]. However, in its recent resolution on human rights and HIV/AIDS, the Parliamentary Assembly of the Council of Europe urged Member States "not to apply Article 5, paragraph 1 (e) of the European Convention on Human Rights to justify automatic isolation or hospitalization solely on grounds that the applicant or holder is infected by the HIV virus". 7/

64. Deprivation of liberty of HIV-postive persons constitutes a form of administrative detention. Mr. Louis Joinet, the United Nations Special Rapporteur on administrative detention, in his latest study for the Commission on Human Rights, recommended that information be gathered on detention on the ground of HIV/AIDS to enable the Commission to analyse this practice in the context of applicable international law. 8/ Mr. Joinet stressed that this practice has created new categories of persons deprived of their liberty, "persons who may be suffering from communicable diseases (quarantine) and persons who, in some countries, are allegedly detained in specialized health centres when their illness is diagnosed (AIDS, for example)." 9/

2. Freedom of movement

65. Freedom of movement comprises a cluster of rights: the right to enter into a country, freedom of movement and residence within a country, and the right to leave a country. Each of these is regulated differently for citizens of the country and aliens. Thus the right to enter a country is confined to nationals of the State concerned and is not subject to any restrictions.

Making the entry into the country of its own returning nationals conditional on their taking an HIV test and obtaining a negative result does not seem compatible with this right.

66. States enjoy a wide discretion over the entry of aliens. The choice of grounds for exclusion is largely a matter for each State to decide upon. This does not, however, mean that there are no restrictions on the discretion of States with regard to the entry of aliens for purposes of travel, work or immigration. Restrictions on this discretionary power of States are contained in their specific treaty obligations. In health matters most States are bound by the International Health Regulations. In addition, the principle of non-discrimination should also apply.

67. HIV/AIDS-related restrictions upon free movement of people across national borders have received immense publicity, but it is seldom emphasized that the majority of countries have not enacted any HIV/AIDS-related restrictions. Recent global overviews have identified at most 50 countries which are reported to have HIV/AIDS-related entry restrictions 10/ the fact that a relatively large number of countries have enacted restrictions nevertheless requires attention because the appropriate international bodies that deal with public health have concluded that such restrictions are an ineffective way of preventing further spread of HIV infection. Moreover, these restrictions ought to be assessed by the criterion of existing international obligations of States to facilitate international movement, including their obligations under human rights treaties.

68. The existing HIV/AIDS-related entry restrictions are extemely varied. A typology can be attempted by pointing out their main features with regard to the grounds for restrictions (HIV infection, AIDS or both), categories of persons affected (where a difference is made between nationals and aliens; and amongst aliens between tourists and other short-term travellers, and aliens applying for residence, work permit or immigration), the purpose of restrictions (some are enacted to prevent the spread of HIV infection, others to pre-empt immigration of persons likely to create costs for health and social services). With regard to the implementation of restrictions, some countries introduced mandatory testing 11/ for specified categories of entrants, while others leave the identification of the persons targeted by restrictions to immigration officials or to self-identification by those persons themselves. Concerning possible effects of such restrictions, little is known on their actual application. Quantitative information is particularly scarce; hence it is not known how many persons have been prevented from entering a country on the grounds of HIV/AIDS, how many aliens have been subject to compulsory screening in countries which introduced it, or how many HIV-infected aliens have been expelled and/or deported.

C. Problems in access to health care

69. AIDS has received enormous attention because of its fatality and also because of the cost of treatment. Many resrictions placed upon international movement of people who are HIV infected, and particularly those who are ill with AIDS, appear to be motivated by the cost of treatment.

70. The costs related to HIV/AIDS have been given much attention because of the high expenses of health care for people with HIV/AIDS, inability of many developing countries to provide such health care and - most importantly - because the vast majority of HIV-infected persons and those with AIDS are in

the age group 20 to 40, thereby belonging to the economically-active population. The economic and social impact of HIV/AIDS - which affects people in their most productive years - is therefore immense.

71. Problems in securing access to health care for people who are HIV-infected and those with AIDS have been twofold: for many, access to health care has been and remains impossible because of the non-availability of medical services, drugs and treatments in their community and country. For others, access to health care has been denied by medical professionals, unfortunately reported from many countries. Though these two problems are distinct, both need to be addressed as two different sides of the challenge HIV/AIDS represents.

IV. FINAL OBSERVATIONS

72. The purpose of this preliminary report has been to raise some of the HIV/AIDS-related problems, not to carry out an exhaustive analysis nor to suggest possible solutions at this stage. The author hopes that this report will provide input to the discussion of pertinent issues, both at the forty-second session of the Sub-Commission and more widely. The guidance by the Sub-Commission in regard to the scope, contents and approaches to be followed in the study will be particularly useful to the author, and views of Member States, institutions, non-governmental organizations and individuals dealing with HIV/AIDS and related human rights issues will be much appreciated.

73. The nature of this subject matter cuts across conventional disciplinary divisions and close collaboration between human rights specialists and those in medicine and public health is indispensable. The author would like to express his appreciation for the support WHO has provided in the preparation of this preliminary report, and to stress that continuation of close collaboration with WHO will be particularly beneficial for the continuation of the study of HIV/AIDS-related discrimination.

Notes

1/ Human Rights Committee, General Comment 4 [13], Article 3, para. 2, CCPR/C/21/Rev.1, 19 May 1989.

2/ Human Rights Committee, General Comment 18 [37], Non-discrimination, CCPR/C/21/Rev.1/Add.1, 21 November 1989, para. 10.

3/ HIV/AIDS & Human Rights Resource Material. Provisional version, third draft, Geneva, March 1990.

4/ Report of the Global Commission on AIDS, Geneva, 29-31 March 1989, GPA/GCA(1)/89.1, para. 19.6.

5/ International Consultation on AIDS and Human Rights, Geneva, 26-28 July 1989, Final document, HR/AIDS/1989/3, paras. 18 (d) and 13.

6/ Human Rights Committee, General Comment 8 [16], Article 9, CCPR/C/21/Rev.1, 19 May 1989.

7/ Recommendation 1116 (1989) on AIDS and human rights, 29 September 1989, para. D (ii).

8/ Although administrative detention is often aimed at the avoidance of the application of basic human rights standards, this application has been affirmed by the Commission on Human Rights: " ... in order to prevent any abuse, the administrative detention procedure must be applied, particularly with regard to duration, in clearly defined conditions laid down by national laws, in accordance with the norms of international law." "Administrative detention without charge or trial", Commission on Human Rights resolution 1989/38 of 6 March 1989.

9/ Report on the practice of administrative detention submitted by Mr. Louis Joinet, E/CN.4/Sub.2/1989/27, 6 July 1989, para. 78 (b).

10/ Duckett, M. and Orkin, A.J., AIDS-related Migration and Travel Policies and Restrictions: a Global Survey, AIDS, vol. 3, 1989, Suppl. 1, S231-S252.

11/ The term "mandatory testing or screening" is used in this text as defined by the WHO Secretariat, that is, "mandatory testing or screening occurs where testing is required of all individuals who voluntarily decide they wish to avail themselves of a service or activity"; "compulsory testing or screening" denotes situations "where both the testing and the service or activity are required". Unlinked Anonymous Screening for the Public Health Surveillance of HIV Infections, proposed international guidelines, GPA/SFI/89.3, Geneva, June 1989, Annex 7.

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Sub-Commission on Prevention
of Discrimination and
Protection of Minorities

Forty-second session
Item 4 of the provisional agenda

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms

Preliminary report submitted by Mr. Theo van Boven, Special Rapporteur

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INTRODUCTION

1. In its resolution 1988/11 of 1 September 1988, the Sub-Commission on Prevention of Discrimination and Protection of Minorities recognized that all victims of gross violations of human rights and fundamental freedoms should be entitled to restitution, a fair and just compensation and the means for as full a rehabilitation as possible for any damage suffered by such victims, either individually or collectively. The Sub-Commission decided to discuss the matter of compensation at its forty-first session with a view to considering the possibility of developing some basic principles and guidelines in this respect.

2. At its forty-first session, in resolution 1989/13, the Sub-Commission, considering the importance of further developing international standards and of filling remaining gaps in order to ensure that victims of gross violations of human rights and fundamental freedoms have an enforceable right to restitution, compensation and rehabilitation, as appropriate, fully recognized at the international level, decided to entrust one of its members, Mr. Theo van Boven, with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, taking into account relevant existing international human rights norms on compensation and relevant decisions and views of international human rights organs, with a view to exploring the possibility of developing some basic principles and guidelines in this respect; the Sub-Commission requested Mr. van Boven to submit a preliminary report for consideration by the Sub-Commission at its forty-second session.

3. The Commission on Human Rights, by its resolution 1990/35 of 2 March 1990, endorsed the above-mentioned resolutions of the Sub-Commission. Upon the recommendation of the Commission on Human Rights, the Economic and Social Council, in its resolution 1990/36 of 25 May 1990, authorized the Sub-Commission to entrust Mr. Theo van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, taking into account, inter alia, relevant existing international human rights norms on compensation and judgements by courts, decisions and views of international human rights organs and bodies, with a view to exploring the possibility of developing basic principles and guidelines in this respect, and requested the Secretary-General to provide Mr. van Boven with all the assistance that he may require for the completion of his task.

4. In the discussion on this question, the Sub-Commission highlighted, inter alia, the following aspects: (a) a right for which there was no remedy is of no practical use to anyone (E/CN.4/Sub.2/1989/SR.6, para. 38); (b) the complex issue of compensation should be studied in greater detail, and on the basis of such a study, thought could be given to formulating basic principles and guidelines (E/CN.4/Sub.2/1989/SR.7, para. 28); (c) basic principles for redress and compensation for victims of human rights violations are lacking under the current system of international instruments (E/CN.4/Sub.2/1989/SR.15, para. 60). It was generally felt that the issue of compensation merited further reflection on the part of the Sub-Commission.

5. The Economic and Social Council, upon the recommendation of the Committee on Crime Prevention and Control, requested in its resolution 1990/22 of 24 May 1990 that the Special Rapporteur of the Sub-Commission takes into account, in his study of compensation to victim of gross violations of human rights, the relevant work and recommendations of the Committee on Crime Prevention and Control.

6. The present preliminary report is prepared pursuant to paragraph 2 of Sub-Commission resolution 1989/13. An interim report on the subject will be submitted to the Sub-Commission at its forty-third session in 1991, and a final report will be submitted in 1992 to the forty-fourth session of the Sub-Commission.

7. It is the intention of the Rapporteur to prepare a questionnaire on the issue of the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and transmit it to Governments and competent international organizations.

8. The purpose of this preliminary report is to outline the main questions to be considered in the study and thus to provide a basis for discussion by the Sub-Commission at its forty-second session. It is expected that this discussion will assist the Rapporteur in determining the framework of the study and identifying the problems to be analysed. In the Annex of the report, the Rapporteur presents a tentative outline for the study; when the study will be in further progress, the outline may need adaptation.

I. RELEVANT EXISTING INTERNATIONAL NORMS

A. International human rights norms (global and regional human rights instruments)

9. A number of both universal and regional human rights instruments contain express provisions relating to the right of every individual to an "effective remedy" by competent national tribunals for acts violating human rights which are granted to him by the constitution or by law. Such formulation is contained in article 8 of the Universal Declaration of Human Rights. The notion of an "effective remedy" is also included in article 2 (3) (a) of the International Covenant on Civil and Political Rights and in article 6 of the Declaration on the Elimination of All Forms of Racial Discrimination.

10. Some human rights instruments refer to a more particular "right to be compensated in accordance with the law" (art. 10 of the American Convention on Human Rights) or the "right to an adequate compensation" (art. 21 (2) of the African Charter on Human and Peoples' Rights).

11. Even more specific are the provisions of article 9 (5) of the International Covenant on Civil and Political Rights and of article 5 (5) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which refer to the "enforceable right to compensation". Similarly, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains a provision providing for the victim of torture a redress and "an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible" (art. 14 (1)).

12. In some instruments, a specific provision is contained indicating that compensation is due in accordance with law or with national law (art. 14 (6) of the International Covenant on Civil and Political Rights and art. 11 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

13. Provisions relating to reparation or satisfaction of damages are contained in the International Convention on the Elimination of All Forms of Racial Discrimination, article 6 of which provides for the right to seek "just and adequate reparation or satisfaction for any damage suffered". The ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries also refers to "fair compensation for damages" (art. 15 (2)), to "compensation in money" and "under appropriate guarantees" (art. 16 (4)), and to full compensation "for any loss or injury" (art. 16 (5)).

14. The American Convention on Human Rights speaks of "compensatory damages" (art. 68) and provides that the consequences of the measure or situation that constituted the breach of the right or freedom "be remedied" and that "fair compensation be paid to the injured party" (art. 63 (1)).

15. The Convention on the Rights of the Child contains a provision to the effect that States Parties shall take all appropriate measures to promote "physical and psychological recovery and social reintegration of a child victim ..." (art. 39).

B. Norms in the area of crime prevention and criminal justice

16. Substantial provisions relating to various questions of restitution, compensation and assistance for victims of crime are contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34 of 29 November 1985). The Declaration provides for the following:

(a) Victims are entitled to prompt redress for the harm that they have suffered;

(b) They should be informed of their rights in seeking redress;

(c) Offenders or third parties should make fair restitution to victims, their families or dependents. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights;

(d) When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation;

(e) Victims should receive the necessary material, medical, psychological and social assistance and support.

The Declaration also provides that Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions (principle 9).

17. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") contains a specific provision to the effect that "in order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims".

C. International humanitarian law norms

18. Article 3 of the Hague Convention Regarding the Laws and Customs of Land Warfare provides for the obligation of the contracting party to pay indemnity in case of violation of the regulations. Article 41 of the IV Hague Convention also provides for the right to demand an indemnity for the losses sustained in cases of violations of the clauses of the armistice by individuals.

19. The Four Geneva Conventions of 12 August 1949 contain similar articles providing that "No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or another High Contracting Party" in respect of grave breaches involving such acts as "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". 1/

20. Article 68 of the Geneva Convention Relative to the Treatment of Prisoners of War contains specific provisions with regard to claims for compensation by a prisoner of war.

21. Article 55 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that the Occupying Power "shall make arrangements to ensure that fair value is paid for any requisitioned goods".

22. Finally, Protocol I (Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts), states in its article 91 that a Party to the conflicts which violates the provisions of the Conventions or of this Protocol "shall ... be liable to pay compensation".

II. THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION UNDER CUSTOMARY INTERNATIONAL LAW

23. The right to restitution, compensation and rehabilitation is intimately linked with the concept of State responsibility. It is interesting to note that the significance of the well-established international law of State responsibility for the international law of human rights has so far received only scant attention. In the following paragraphs, some important aspects of the international law of State responsibility will be highlighted, with a particular focus on the question of reparation. In this regard it is, of course, relevant to refer to the codification efforts of the International Law Commission. This Commission has so far adopted 35 draft articles on State responsibility.

24. State responsibility is the obligation of a State to make reparation arising from a failure to comply with an obligation under international law. State responsibility applies in the case of an act or omission in violation of

an international legal obligation, attributable to the delinquent State, resulting in injury to the claimant State (see also draft article 3, International Law Commission). In the judgement on the Chorzów Factory (Indemnity) Case, the Permanent Court of International Justice ruled:

> "It is a principle of international law, and even a general conception of law, that any breach of an engagement invokes an obligation to make reparation. [...] reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself." 2/

State responsibility can result from actions directly attributable to the State through its agents (original responsibility) or from actions that only indirectly involve the State (vicarious responsibility).

Reparation

25. The basic principles governing reparations for breaches of international obligations were established by the Permanent Court of International Justice in the Chorzów Factory (Indemnity) Case as follows:

> "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law". 3/

The four main forms of reparation are restitution, indemnity, satisfaction and declaratory judgement.

A. Restitution

26. Restitution in kind is designed to re-establish the situation which would have existed if the wrongful act or omission had not taken place, by performance of the obligation which the State failed to discharge: revocation of the unlawful act, return of property wrongfully removed or abstention from further wrongful conduct. The Permanent Court of International Justice implied in its decision in the Chorzów Factory (Indemnity) Case, that restitution is the normal form of reparation and indemnity could only take place if restitution in kind is not possible.

B. Indemnity

27. This is in practice the most usual form of reparation. The indemnity should compensate for all damage which results from the unlawful act, including a profit which would have been possible in the ordinary course of events, but not prospective gains which are highly problematical, too remote or speculative. The basic test is the certainty of the damage. It is not

essential that the damage should have already taken place for compensation to be recoverable. The possibility of punitive or exemplary damages is a matter of some debate in international law. It is generally believed, however, that the imposition of such damages would go beyond the jurisdiction conferred on the International Court of Justice and beyond the jurisdiction normally attributed to arbitral tribunals.

C. Satisfaction

28. Satisfaction may be defined as any measure which the author of a breach of duty is bound to take under customary law or under an agreement by the parties to a dispute, apart from restitution or compensation. There are three objects of satisfaction which are often cumulative: (a) apologies or other acknowledgement of wrongdoing, e.g. by means of payment of an indemnity; (b) the prosecution and punishment of the individuals concerned; and (c) the taking of measures to prevent a recurrence of the harm. There is no evidence under international law of a rule that provides that satisfaction is alternative to and, on being given, exclusive of a right to compensation for the breach of duty.

D. Declaratory judgement

29. A declaratory judgement of a court as to the illegality of the act of the defendant State constitutes in some cases a measure of satisfaction (or reparation in the broad sense). In various instances, the International Court of Justice has been willing to give declaratory judgements, using such formulas as that a State " ... is under a duty immediately to cease and refrain from all such acts as may constitute breaches of the foregoing legal obligations". 4/

30. In his next report, the Special Rapporteur will study in detail the significance of the various forms of reparation under customary international law as briefly described above, with particular reference to compensation for victims of gross violations of human rights. The work of the International Law Commission on the codification and progressive development of the international law of State responsibility will then be duly taken into account.

III. BASIC QUESTIONS AND ISSUES

31. The study entrusted to the Special Rapporteur raises questions and issues which are of considerable legal and moral interest and importance. These questions and issues touch upon the responsibility of States. At the same time they relate to individuals, groups and communities who are victims of gross violations of human rights and who are entitled to remedial justice. The Rapporteur wishes to recall that Sub-Commission resolution 1989/14 of 31 August 1989 which defined his mandate, expressed its deep concern over the substantial damages and acute sufferings caused to these victims. It is therefore the Rapporteur's view that his mandate requires him to be particularly mindful of the perspective of the rights and interests of the victims.

32. Before embarking upon an in-depth analysis of the various aspects of the subject matter of the study, the Rapporteur feels the need of seeking guidance on matters of general orientation and approach. To this end, he has

identified some questions and issues which he would like to discuss in a preliminary and summary fashion. He hopes that the comments he may receive will assist him in setting forth the framework of the study. Among the questions and issues that need to be further discussed and reviewed are the following:

(a) The obligation to grant compensation under international law;

(b) Entitlements to compensation (in particular the scope of the term "victims of gross violations of human rights and fundamental freedoms");

(c) Various types of compensation;

(d) From whom can compensation be sought?

(e) Does a period of limitation apply?

A. The obligation to grant compensation under international law

33. There is no doubt that the obligation to provide for compensation as a means to repair a wrongful act or a wrongful situation is a well established principle in international law. This principle was reaffirmed many times by international tribunals, notably by the Permanent Court of International Justice in the Chorzów Factory Case referred to above (paras. 24-25).

34. In the area of humanitarian law, the obligation of States to pay compensation for breaches of the laws and customs of war was already recognized in Article 3 of Hague Convention No. IV (1907), which is literally reproduced in Article 91 of Additional Protocol I (1977) to the Geneva Conventions of 1949. Related to these articles is the common provision in the four Geneva Conventions to the effect that no State shall be allowed to absolve itself or any other State of any liability incurred by itself or by another State with respect to grave breaches listed in the Geneva Conventions (common Article 51/52/131/148). There are strong arguments for assuming that the obligation to pay compensation for violations of basic rules of humanitarian law has become a part of customary international law.

35. As is clear from the survey of relevant existing international norms (see paras. 9-22 above), many human rights conventions adopted at global and regional levels require States to provide remedies for victims of violations of norms recognized in these conventions. Moreover, some treaties grant victims an enforceable right to fair and adequate compensation. Fully in line with these provisions, international bodies entrusted with the task to supervise the observance of these human rights treaties held that States Parties to whom violations of human rights can be attributed are liable to pay compensation to the victims or to their relatives. The relevant case law will be examined in a next phase of this study.

36. The obligation to pay compensation is evidently an important aspect of the law of State responsibility which is the subject of a comprehensive study of the International Law Commission as part of the United Nations work of codification and progressive development of international law. The recent second report on State Responsibility of the Special Rapporteur of the International Law Commission (document A/CN.4/425 and Add.1) deals with the

substantive consequences of an internationally unlawful act, in particular with the areas of injury covered respectively by compensation and satisfaction. In the further stages of preparation of his study, the Special Rapporteur will take into account the work of the International Law Commission relevant to his mandate.

B. Entitlements to compensation

37. For purposes of the present study Sub-Commission resolution 1989/14 provides some useful guidance with respect to the question of who is entitled to compensation. Ratione personae, the resolution mentions in its first preambular paragraph "individuals, groups and communities". This would imply that the study should not exclusively deal with individuals, but that in appropriate cases the entitlement to compensation of collectivities should also be considered. That collectivities are not excluded is confirmed in Sub-Commission resolution 1988/11 of 1 September 1988 which, in its first operative paragraph, refers to "victims, either individually or collectively".

38. Another indication as regards the categories of victims who fall under the scope of this study is the repeated reference in Sub-Commission resolution 1989/14 to "gross violations of human rights and fundamental freedoms". While under certain international instruments any violation of provisions of these instruments may entail a right to an appropriate remedy, the present study focuses on gross violations of human rights and fundamental freedoms. Many authors have given their views as to what acts and practices would constitute gross violations of human rights as distinct from other violations. The Special Rapporteur is ready to consider in this respect various formulas and options; however, at this preliminary stage, he feels that useful, albeit not conclusive, guidance can be found in the following formula, as a description of the types of violations of human rights which may be considered as falling within the ambit of this study:

> "[A State, violates international law if, as a matter of State policy, it practices, encourages or condones]
>
> (a) genocide,
>
> (b) slavery or slave trade,
>
> (c) the murder or causing the disappearance of individuals,
>
> (d) torture or other cruel, inhuman or degrading treatment or punishment,
>
> (e) prolonged arbitrary detention,
>
> (f) systematic racial discrimination, or
>
> (g) a consistent pattern of gross violations of internationally recognized human rights." 5/

39. It is generally recognized that victims who are entitled to compensation - and this may also include their relatives and survivors - have suffered substantial damages and harm. This is also reflected in the first preambular paragraph of Sub-Commission resolution 1989/14 which refers to

"substantial damages and acute sufferings". In this regard the notion of "victims", spelled out in paragraph 18 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, has to be taken into account. The paragraph reads in part:

> "Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that [...] constitute violations [...] of internationally recognized norms relating to human rights".

C. Various types of compensation

40. It is quite clear from the wording of the Sub-Commission resolution 1989/14 that the notion of compensation should be understood in a wider sense than in pecuniary terms. The fourth preambular paragraph and operative paragraph 1 refer to the right to restitution, compensation and rehabilitation. Similar wording was also used in Sub-Commission resolution 1988/11. In this respect, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power may again serve as a helpful frame of reference. In paragraph 19 of this Declaration, dealing in particular with remedies to victims of abuses of power, it is stated that "... such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support".

41. It should be recalled that the international law of State responsibility envisages reparation for the wrongful act. While reparation usually takes the form of restitution and/or compensation, there may be other means of granting satisfaction to the victims, for instance in the form of injunctive relief with a view to preclude the further continuation or repetition of the breach of law or by establishing accountability for such breaches. Furthermore, it should not be overlooked that the disclosure of the truth after an official and thorough investigation of the facts and circumstances in connection with gross violations of human rights and fundamental freedoms may constitute another important means of providing satisfaction to the victims. Although the Special Rapporteur is aware that his mandate has as a main focus the right of victims to restitution, compensation and rehabilitation, he is not unmindful of the fact that granting just satisfaction to those victims individually and collectively may have broader implications, pertaining to matters of political, social and criminal justice.

D. From whom can compensation be sought?

42. The question arises whether the present study should deal with the responsibility of States to grant compensation in appropriate cases, or whether, in addition, other entities, for instance industrial concerns and other corporate enterprises in so far as they can be held accountable for causing serious human suffering, should be brought within the scope of the study. With regard to this question, the Special Rapporteur is inclined to interpret his mandate solely from the point of view of the responsibility of States which, to the extent that serious breaches of human rights are imputable to them, are under an obligation to grant compensation to the victims. This approach should, however, in no way be considered as detracting from a victim's right to bring in appropriate cases civil action against non-State entities.

43. It is therefore proposed that for the purpose of this study the State is envisaged as the instance to which claims for compensation should be addressed. The next question is how far the imputability of States extends with regard to serious breaches of basic human rights. The Special Rapporteur will have to examine the relevant doctrine and practice in order to further define the imputability of States. In this connection, the recent judgement of the Inter-American Court of Human Rights in the Velásquez Rodriguez Case 6/ may prove to be of major importance. In this judgement, the Court stated that violations of human rights carried out by an act of public authority or by persons who use their position of authority is imputable to the State, the Court stated in addition that an illegal act which violates human rights and which is initially not imputable to the State can entail the international responsibility of the State if the latter has failed to exercise due diligence because of failure to take the necessary preventive and repressive measures.

E. Does a period of limitation apply?

44. Statutory limitations are applied in the area of criminal justice. The applicability of statutory limitations is generally based on the assumption that passage of time has the effect of gradually erasing the infraction of the legal order and that it may diminish the reliability of evidence. However, important sectors of legal opinion oppose the application of a period of limitation with regard to the most serious crimes. This principle is reflected in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

45. The question now arises to what extent a period of limitation applies to the exercise of the right to restitution, compensation and rehabilitation by or on behalf of victims of gross violations of human rights and fundamental freedoms. The Special Rapporteur believes that weighty arguments can be adduced against a short, finite statutory period for the filing of claims. He favours an open-ended or very long period. First of all, it should be taken into account that this study is concerned with the effects of gross violations of human rights, which have much in common with the most serious crimes of the nature of crimes against humanity. A second, no less important consideration, is that on the part of many victims of gross violations, passage of time has often no attenuating effect, but on the contrary an increase in post-traumatic stress, requiring all necessary material, medical, psychological and social assistance and support over a long period of time.

Notes

1/ See articles 50 and 51 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; articles 51 and 52 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; articles 130 and 131 of the Geneva Convention Relative to the Treatment of Prisoners of War; and articles 147 and 148 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

2/ P.C.I.J., Collection of Judgements, Series A, No. 17, p. 29.

3/ P.C.I.J. op. cit., p. 47.

4/ Case Concerning Military and Paramilitary Activities Against Nicaragua, Merits, ICJ Reports of Judgements, Advisory Opinions and Orders (1986), p. 149, para. 12.

5/ Section 702 of the Third Restatement of the Foreign Relations Law of the United States (1987).

6/ Judgement of 29 July 1988, Inter-American Court of Human Rights, Series C: Decisions and Judgements No. 4, in particular paras. 172-174.

Annex

Tentative Outline of the study

Introduction

Description of the mandate

I. Relevant existing international norms

A. International human rights norms (global and regional human rights instruments)

B. Norms in the area of crime prevention and criminal justice

C. International humanitarian law norms

II. The right to restitution, compensation and rehabilitation under customary international law

III. Relevant decisions and views of international human rights organs

A. Pronouncements of the United Nations General Assembly, the Economic and Social Council, the Commission on Human Rights, the Committee on Crime Prevention and Control

B. Views and recommendations of Charter based human rights organs, such as the United Nations Ad Hoc Working Group of Experts on Southern Africa, the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, the Working Group and Special Rapporteur on Chile, the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Summary or Arbitrary Executions, the Special Rapporteur on Torture

C. Views and decisions of treaty based human rights organs, such as the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women, the European Court of Human Rights, the Inter-American Court of Human Rights

IV. Inter-State law and practice

(NB Wiedergutmachung)

V. National law and practice

VI. Basic questions and issues

A. The obligation to grant compensation under international law

B. Entitlements to compensation (in particular the scope of the term "victims of gross violations of human rights and fundamental freedoms")

C. Various types of compensation

D. From whom can compensation be sought?

E. Does a period of limitation apply?

VII. Suggested basic principles and guidelines